Questions and Answers for Represented Employees

June 20 2005

Anniversary Date

For represented employees after July 1, 2005, are there any adjustments to the unbroken service and anniversary dates used for leave accruals for leave without pay?

No, unbroken service and anniversary dates are not adjusted for leave without pay per the CBAs.

Bargaining

What's a demand to bargain and what do you do with it?

A demand to bargain may be issued by the union to the Labor Relations Office (LRO) or to the agency over changes the agency wants to make to mandatory subjects of bargaining and/or over the impacts from implementation of changes that affect employees' working conditions. If you receive a demand to bargain from the union you should immediately contact your LRO representative for consultation.

Career Development

Both the WFSE and WPEA MAs seem to continue to allow career development appointments in Article 8, yet the general government transition issue document says that the MAs do not allow career development. Do the MAs allow career development?

Although the WFSE MA mentions career development there is no method to appoint someone to a career development position under the terms of the MA. The agency can accomplish the same thing by appointing someone to a non-permanent appointment and giving them return rights back to their original position after the completion of the non-permanent appointment.

The WPEA MA defaults to WAC 357-34-050 which does allow for career development. Agencies with WPEA bargaining units can appoint WPEA represented employees to career development positions under the terms specified in WAC 357-34-050.

Contract Distribution

Who is going to distribute the MAs to represented employees?

The employer will distribute the MAs to represented employees, with the exception of those employees represented by WPEA. WPEA members will receive copies of the MAs from WPEA.

Grievances

If Management believes there is a procedural defect (untimely, not complete, etc.) in a grievance, does management need to address the merits of the grievance in the response, or can they just raise the procedural defect and not address the merits?

Management must address both the procedural defects and the merits in the response at each step. Procedural defects are a due process matter to be decided by the arbitrator, not management. Management can raise the issue of the defect with the grievant (union) and offer to address the merits of the issue outside of the grievance process. If the grievant (union) is unwilling to resolve the issues in the grievance outside of the grievance process, management must process the grievance and address both the merits and the procedural defect at each step in the grievance process.

If an employee has filed a grievance and they have not requested mediation or arbitration on that grievance prior to July 1, 2005, what happens to the grievance on July 1, 2005?

Grievances filed under collective bargaining agreements (CBA) in effect prior to July 1, 2005, must be processed in accordance with the respective CBA through all internal agency levels, even if that processing goes beyond July 1, 2005.
RCW 41.80.900 specifies that grievances that have been filed to mediation or arbitration by July 1, 2005, must be processed by the Personnel Resources Board (PRB); however, RCW 41.80.900 does not allow the PRB to process requests for grievance mediation or arbitration filed after July 1, 2005. Therefore, it appears that grievances that were filed prior to July 1, 2005, that do not get resolved within the agency, and have not been filed for mediation or arbitration prior to July 1, 2005, have no venue for further action after July 1, 2005.

Hiring

An agency does a recruitment using a combination of DOP referrals and agency referrals, certifies a pool of candidates and then closes the referral. After the referral is closed, the agency decides to use the pool of certified candidates to fill more than one position over a period of time. Can the agency add selected names to the closed, certified candidate pool without opening the pool to all new applicants that have submitted applications since the referral was closed?

LRO would advise against an agency adding names to a certified candidate pool after the referral is closed. If an agency finds additional qualified candidates that they would like to consider, LRO believes that the agency would be best protected by re-opening the referral and allowing all new, qualified applicants to be considered for the certified pool.

HRMS

If leave accruals happen differently between represented and non-represented employees will the system handle this issue or will we be required to track manually?

The Human Resource Management System (HRMS) will be designed to handle the terms of the MAs, although it may not be able to handle the terms of the MAs on July 1, 2005. Contact your agency "Change Agent" for an update on HRMS status.

In-Training

What are the reversion rights of an employee who is in an in-training position?

Because there are some differences in each MA, agencies that have this issue should read their MA and contact their LRO liaison or assigned AG for guidance.

Labor Management Communications Committees (LMCC)

How does RCW 41.06.540 interplay with the Labor Management Communications Committees (LMCC) outlined in the Master Agreements (MAs)?

The LMCC accomplishes the intent of RCW 41.06.540 by providing a forum where the employer and representatives of employees can discuss ideas that will address the goals mentioned in the RCW. This RCW does not supplant the MA(s).

Labor Relations Office (LRO)

What is LRO's role with the agencies in non-Master Agreement bargaining after July 1, 2005?

Effective July 1, 2005, the State is considered a single employer with the Governor's office in charge of labor relations. The LRO has been designated by the Governor as the chief spokesperson on all labor issues. Agencies must consult with LRO when: 1) the Agency (Employer) is considering making changes in a mandatory topic not covered by the MAs; 2) a newly certified unit demands to bargain; and 3) when the union is asking the Agency to interpret or discuss the MAs. Each agency has an appointed LRO contact and we encourage agencies to consult with LRO on all matters related to the MAs.

LRO has developed an internal checklist, which we use to determine how, or if LRO should be involved. Agencies are encouraged to develop the same type of internal checklist.

- What is the scope of the issue(s)
- Is it covered in the MA?
- What are the facts?
- Is this mandatory or permissive subject of bargaining?
- Is there a policy, past practice, DOP rules, etc., on this topic

Master Agreements

What should managers be saying to employees about the MAs?
Managers have always had the responsibility to discuss how business needs to get done and communicate their expectations to employees. That role is now more critical than ever before.

The MAs simply provide a framework that give managers the flexibility to make necessary business decisions--it's up to managers to make and communicate those decisions.

Not only are managers responsible for knowing what options are available in the MAs, they must understand how their agency and workgroup will use the new opportunities to improve service delivery.

State employees operate in extremely different work environments, from very scheduled institutional settings to more flexible field settings. These various business situations will each be uniquely impacted by the MAs.

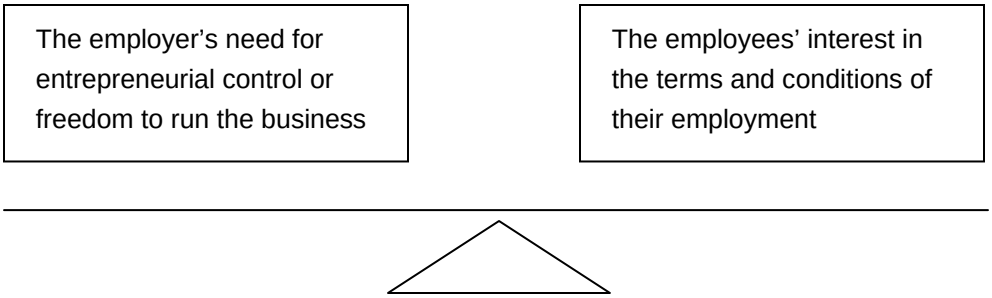
Managers will need to make different decisions, as they do today, to improve business, and must make sure that employees understand how the MAs will impact them. Managers should work with supervisors and develop ways to keep employees informed of any changes.

Managers have been given the opportunity to attend training and receive information on the MAs and new personnel environment. Managers are expected to familiarize themselves with the terms of the MAs, making sure to ask questions and discuss issues with their HR staff, and are prepared and able to discuss the MAs with employees and answer employee questions about the MAs.

Mandatory Topics

What is the difference between a mandatory and permissive subject of bargaining?
An important difference between a mandatory and permissive subject of bargaining is that neither party has to bargain permissive subjects; they may, but there is no requirement that they have to bargain on a permissive subject. They may agree to bargain a permissive subject one year, and then refuse to bargain over it another year, and vice versa. They may engage in bargaining on a permissive subject during some sessions, and then decide not to discuss it any further later. [NOTE: All this must be done in good faith—no trickery!] Since neither party *has* to engage in bargaining on permissive subjects, refusing to bargain those subjects cannot lead to

impasse. So when and if the parties reach impasse (on mandatory subjects), permissive subjects can no longer be bargained.
But which subjects are which? Mandatory subjects directly affect wages, hours or working conditions (W/H/WC). When a subject does not directly affect W/H/WC, PERC uses a balancing test to decide whether it is permissive or mandatory. *IAFF, Local 1052 v. PERC,* 113 W.2d 197 (1989).



Port of Seattle, Decision 7271-B (PECB, 2003) So, on one side of the balance is how close is this decision to the heart of the employer's fundamental need and right to be able to run his/her business? On the other, is how close is this decision to the employees' right to influence their "wages, hours and working conditions"? If it's a close call, PERC just looks harder to see "which of these characteristics predominates." *IAFF Local 1052; Spokane International Airport,* Decision 7899 (PECB, 2002).

Said another way, PERC applies a two-part test: 1) Does the topic directly relate to wages, hours, or working conditions? If so, it's a mandatory topic; 2) If not, which weighs more: the employer's need to unilaterally make the decision without bargaining, or the employee's interest in wages, hours and working conditions? If it is the latter, it's mandatory.

Determining whether a subject is mandatory or permissive is not black and white, but grey. And there are many, many cases on the issue because it's grey: in every case one party guessed wrong. All we can do is research the list and the cases, and if the subject hasn't been addressed yet, see if it's similar to a subject that has been decided and/or apply the two-part test.

Remember: even when a subject is permissive because it's an entrepreneurial decision, the employer may still need to bargain over the effects of that decision. *City of Anacortes,* Decision 6830-A (2000).

What is the interplay between a mandatory subject and a permissive subject and the duty to bargain?

A mandatory subject requires bargaining over the decision and the effect/impact. A permissive subject does not require bargaining over the decision, but may require bargaining over the effect/impact.

The bargaining obligation is applicable as to both a decision on a mandatory subject of bargaining and the effects of that decision, but will only be applicable to the effects of a managerial decision on a permissive subject of bargaining. For example, compare: Skagit County, Decision 6348 (PECB, 1998) and City of Kelso, Decision 2120 (PECB, 1985) [Kelso I] (where both the decision to contract out bargaining unit work and its effects on the employees were mandatory subjects of bargaining), with City of Kelso, Decision 2633-A (PECB, 1988) [Kelso II] (where the decision to merge with another employer was an entrepreneurial decision, and only the effects of that decision on employee wages, hours, and working conditions were mandatory subjects of bargaining). Richland School District, Decision 7367 (PECB, 2001).

Miscellaneous Leave

In the past employees were allowed miscellaneous leave, which had no number of hours specified, for such matters as a) attending safety meetings; b) taking state vehicles in for repair or service; c) picking up personal protective equipment; d) doctor appointment for work related injuries such as critical stress counseling, hearing tests, etc. The MA is specific on the use of miscellaneous leave. Does the specificity in the MA limit the types of miscellaneous leave an employer can grant?

Yes, since the MAs specifically address the topic and contain limiting language as to what miscellaneous leave can be granted for, those would be the only reasons an agency could grant miscellaneous leave.

If these matters are not appropriate for miscellaneous leave, are these matters considered work related activities and are done during work time and compensated as such?

The MA gives the Agency some discretion as to what it considers work hours. If these activities are job related (required), then the time required to do the job is work time.

Are there other reasons that miscellaneous leave may be given to a represented employee other that those identified in the MAs?

No. The MAs contain the only reasons that the Employer may grant miscellaneous leave to an employee.

Past Practice

What is a "past practice"?

"Past practice" is a term of art used in labor relations to determine a party's rights or responsibilities. As such, it should be distinguished from its ordinary meaning, which is simply "an activity that has occurred". The term is used in three significant situations in labor relations to resolve disputes. First, where there is clear, unambiguous contract language; second, where there is ambiguous contract language; and third, where there is no contract language at all on a given topic.

Clear contractual language. Even where the parties have agreed on clear, unambiguous language on a topic, their practices may contradict that language, and one of the parties may seek to enforce the practice instead of the contract. In such cases, most arbitrators will find that the language expressly agreed upon by the parties outweighs any practice to the contrary. Note: if you find that your practices contradict the clear language of the contract and you wish to discontinue the practices, give the other party notice that you intend to do so.

Ambiguous or vague language. In contrast, many arbitrators will rely on past practices to interpret ambiguous or vague contract language. When the parties disagree as to the meaning of a contractual provision, often they will use past practices to support their cases. Prior to considering and giving weight to past practices in such situations, however, the arbitrator must first decide whether the language is truly unclear. If not, the practice should have no bearing on the case. If so, arbitrators may attempt to discover the meaning of the language from the conduct of the parties over the course of time.

No language. Finally, one party may seek to bind the other to continuing a practice even though the negotiated agreement is silent upon the topic. In these situations, the practice must be shown to be the understood and accepted way of doing things over an extended period of time. Thus, a practice known to just one side and not the other is unlikely to rise to the level of an enforceable agreement.

In any case, but more so where the contract is silent, arbitrators will only enforce a past practice that is unequivocal; clearly enunciated and acted upon; and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Said another way, the practice must be clear (and uniform); consistent (and repetitious); and condoned (and mutually observed).

When do past practices end?

Under the terms of the MA, all past practices end on July 1, 2005. However, because of the controversial nature of this issue, there may be a need for further discussion regarding communication on this issue. Agencies should consult with their LRO liaison if they are unclear of how to proceed.

PID

What happens to employee's Periodic Increases on July 1, 2005?

For all represented units, all employees not yet at Step K who were hired at the minimum step of the pay range and who were hired above the minimum step of the pay range will need their periodic increase dates adjusted according to the CBAs.

The new CBAs set new PIDs with each appointment to another position with a different salary range maximum, as well as set the actual hire date as the PID date rather than rounding the PID to the first of the month.

For represented employees after July 1, 2005, are there any adjustments to the periodic increment dates for leave without pay?

No, periodic increment dates are not adjusted for leave without pay per the CBAs.

For represented employees after July 1, 2005, if an employee is due their periodic increment date increase on the exact same day that the employee also is promoted via an in training plan, which do you do first to determine their salary?

First you would give the employee the PID increase they were due for their current class and then you would promote them to their new class, following the rules of promotion in their CBA and reset their PID date if they are not yet at Step K.

How do you determine the PID date for a permanent represented employee that is on a non-permanent appointment, when the employee returns to their permanent class?

You determine the employee's PID date from the employee's original appointment date to their permanent class, not the date they returned to the permanent class. You would set their salary upon return in the same manner as you do now, you would adjust it for any PIDs the employee missed, while the employee was in the non-permanent appointment.

Policies

When does a policy conflict with the MA?

The Entire Agreement clauses in the Master Agreements (MAs) provide that when an agency's policy conflicts with the MA, the MA controls. Where there is no conflict, the policy supplements the MA.

A clear example of a conflict is where a policy provides for overtime compensation for overtime-exempt employees, and the MA prohibits the same. Given the conflict, the MA prevails, and the agency may not provide overtime compensation for overtime-exempt employees covered by the MA.

An example of a supplementary policy is where an agency policy provides for "rounding up" overtime, and the MA is silent on "rounding up." In this case, there is no conflict, so the policy supplements the MA.

But not all examples are so clear. One that arises frequently is where the MA provides a list. As is common in ordinary language, a list usually operates to include the items expressed, and exclude all others. For example, Mary sends an e-mail message to Tom indicating that she is available to meet with him on June 1, 3 and 6, July 4, 11 and 21, and August 3 and 10. Tom would likely be correct in assuming that Mary is unavailable for the meeting on any other dates in June, July and August. From this assumption comes the maxim *expressio unius est exclusion alternius* (the expression of one thing is the exclusion of another").

Applying this maxim to, for example, the list of various forms of miscellaneous leave in our MAs, it is presumed that the parties intended that there be no other forms of miscellaneous leave. In other words, the list is exclusive. Therefore, given our Entire Agreement language, an agency policy providing an additional form of miscellaneous leave would be in conflict with this exclusive list, and would not be enforceable.

Unlike lists, ordinary prose is not usually inherently exclusive. For example, the WPEA MA provides that
"With prior approval, overtime-exempt employees are authorized to receive exchange time at the rate of equal hours off for hours worked above forty-five (45) hours in a workweek."
Since the clause is silent on the maximum number of hours of exchange time an overtime-exempt employee can accrue, the MA does not conflict with an agency policy containing a cap on exchange time. Therefore, the policy would supplement this clause, not conflict with it.

In the Master Agreement there are several Articles that reference continuing current agency policy. Does that mean agencies are locked into the policies that were in place as of the time the parties reached agreement?
Agency policies referred to in the MA are usually those policies that existed on the date that the "tentative agreement" was signed containing references to those policies. However, it is important that the agency read the MA to make this determination. Words such as "current", "in effect at this time", etc., indicate that the MA is referring to a policy that existed at the time the "tentative agreement" was signed. This should not be interpreted as meaning that if an agency did not have a policy on a mandatory subject, that they can unilaterally adopt a new policy on that topic prior to July 1, 2005. If agencies want to change a policy on a mandatory subject they need to contact LRO about bargaining that change.

What should we do to change our policies to comply with the MA?

The agencies have 3 choices: 1) where the topic is covered in the MA, indicate that an existing policy on that topic applies only to non-represented employees; 2) change the policy to comply with the MA (be careful to change only the parts of the policy that are addressed in the MA and use the language from the MA; or 3) indicate in the existing policy that the MA language controls on the topic if it conflicts with the existing policy.

What if an agency does not have an existing policy but the MA refers to the agency policy, e.g. WFSE MA, Article 22.4.b., references the agency policy on drug testing. What does the agency do?
Contact your LRO resource person and they will assist with the development of a policy that mirrors the MA, if such a policy is required.

Project Appointments

If we have employees that were appointed to projects under WAC 356, do we have to terminate and reappoint these project positions prior to July 1, 2005 to comply with the MAs?
If the agency reviews the project language in the MA and determines there is no substantive difference between the MA language and WAC 356, the agency does not have to terminate and reappoint project positions prior to July 1, 2005. Agency representatives can exercise their discretion in this case.

Shop Stewards

How do agencies handle leave for training of current stewards?
The MAs provide for shop stewards to receive time off without pay for training, subject to the operational needs of the Agency as determined by management (except for the coalition agreement).

In the MAs, Management agreed to allow the union to train current shop stewards. What does the term "current" refer to?
The union would be expected to train shop stewards that are in place on July 1, 2005. The MA does not go into effect until July 1, 2005, and therefore its provisions cannot be enforced until that date.

Unbroken Service

For represented employees after July 1, 2005, are there any adjustments to the unbroken service and anniversary dates used for leave accruals for leave without pay?
No, unbroken service and anniversary dates are not adjusted for leave without pay per the CBAs.

Union Security

If an employee fails to pay union fees is there a notice requirement prior to the effective date of termination?

The MAs provide that the Employer will give notice of the union shop requirement to new employees and the union will give notice to current employees. If the employee fails to pay the required union dues, the union will notify the Employer of the failure to pay the required dues. The Employer will give notice to the employee that employment may be terminated if union dues are not paid. We would anticipate that prior to termination, agencies would engage in a discussion with an employee who was refusing to pay union dues to make sure the employee understood the consequences of his/her act. The AG's office is preparing a form letter to present to the employee who refuses to pay union dues.

Vacations

Does an employee need to have sufficient vacation hours on the books before he/she can request vacation time?

No, the MA should be interpreted as allowing an individual to schedule vacation leave if he/she will have sufficient vacation hours to cover the requested leave at the time the requested vacation is to be taken.

What if the vacation time arrives and the employee does not have the hours of vacation leave necessary to take the vacation?

The employer may grant LWOP to an employee who does not have enough leave hours on the books to cover a previously scheduled vacation. It is discretionary to the manager under the LWOP provision of the MA. A manager may not allow an employee to use future anticipated vacation time to cover a previously scheduled vacation.

If agencies had vacation scheduling in their previous CBA and it is not addressed in the Master Agreement, what process should they use to schedule leave?

If the MA is silent on the topic, then WAC and/or Agency Policy would apply. If there is no WAC or Agency Policy that covers the topic then management has the right to, and should, decide how vacation leave is going to be scheduled.

The WFSE MA, and most, if not all, other MAs, covers this subject. In recent training, LRO advised that we would recognize vacation scheduling already underway (as dictated by existing CBAs) and change to new process next year, per the terms of the MA, so those agencies with vacation scheduling requirements that occur prior to July 1, 2005 would not have to re-do the process when the MA takes effect.

WMS

Can a WMS employee be in a collective bargaining unit after July 1, 2005? It appears that the DOP Data Warehouse still shows some WMS employees in a bargaining unit.

Until July 1, 2005, RCW 41.06 allows WMS employees to be in a bargaining unit. Effective July 1, 2005, RCW 41.80 mandates the removal of all WMS employees from bargaining unit(s). Agencies will need to ensure that WMS employees are recoded effective July 1, 2005 and agencies need to insure that WMS employees do not get the pay increase until 9/1/05.